

TOWN OF KITTERY, MAINE  
PLANNING BOARD MEETING  
Council Chambers

APPROVED  
September 26, 2013

Meeting called to order at 6:08 p.m.

Board Members Present: Tom Emerson, Deborah Driscoll, Mark Alesse, Ann Grinnell, Susan Tuveson, Bob Melanson, Rich Balano

Members absent: none

Staff: Gerry Mylroie, Planner; Chris DiMatteo, Assistant Planner

Pledge of Allegiance

Minutes: September 12, 2013

Deferred

Public Comment: There was no public comment.

**PUBLIC HEARING/OLD BUSINESS**

**ITEM 1 – Yankee Commons Mobile Home Park Expansion – Subdivision Preliminary Plan Review.**

Action: Continue Review, grant or deny preliminary plan approval. Stephen A. Hynes, Trustee, owner, proposes to expand the adjacent Yankee Commons Mobile Home Park to create 79 sites on 50 acres. Property is located off Idlewood Lane/U.S. Route 1, Map 66 Lots 24, Mixed Use (MU) Zone. Agent is Tom Harmon, PE, Civil Consultants.

Brian Rayback, Attorney, Pierce-Atwood, is requesting a decision as to whether a mineral extraction permit is required for this project.

Mr. Emerson summarized that the Code Enforcement Officer's decision agreed with the Board's prior decision, her decision was appealed to the Board of Appeals, where it was overturned. Mr. Mylroie furthered that her findings have been provided to the Board for consideration, per the Town Attorney's direction.

Mr. Balano noted he has always had concerns regarding expansion of a mobile home park in a mixed-use zone. This is a threshold issue – whether state statute preempts local zoning. He believes the Maine Supreme Judicial Court would uphold the Board's opinion that mobile home parks are not permitted in the mixed-use zone. He referenced Title 38 Section 4358 Regulation of Manufactured Housing, Section 3M – *Municipalities shall permit mobile home parks to expand and develop in a number of environmentally suitable locations in the municipality with reasonable consideration being given to permit existing mobile home parks to expand in their existing locations.* The applicant interprets this to say that mobile home parks can expand in spite of what our existing ordinances state. This statute gives four reasons a community may not use in making a decision, and existing zoning, in our case mixed-use, is not one of those reasons. He read, Location of Manufactured Housing, Section 2: *Municipalities shall permit manufactured housing to be placed or erected on individual house lots in a number of locations on undeveloped lots where single family dwellings are allowed.* Single family dwellings are not allowed in a mixed-use zone; they are grandfathered but are not allowed as new developments. I brought up my concerns and the Town Attorney said we had no defense. We as a Board can apply our reasonable consideration to say we do not want an expansion of manufactured housing in mixed-use zones. He asked the Board to consider including the following to the Findings of Fact:

13. The project as an expansion of a mobile home park under subsection 3M is not preempted under MSRA 38§4358 and is not permitted in a mixed-use zone where single family dwellings are not permitted, under subsection 2 of the same statute.

If manufactured /single family homes are allowed in the mixed-use zone, why not allow traditional single family homes. The applicant references section 3M, arguing they may add single family homes wherever they want. He believes it would be a disservice to the Town if the Board permits a use that is clearly not allowed in the code.

Mr. Emerson agreed with Mr. Balano and noted that a manufactured home is just a different kind of single family home. Ms. Grinnell recommended that Mr. Balano add his suggestion when the Findings are read. Mr. Melanson thanked Mr. Balano for his comments and recommended the Board receive from the Town Attorney a determination regarding this issue prior to moving on the Findings. Mr. Balano stated the Town Attorney has told the Board it is up to them to make a decision based on reasonable consideration. Ms. Grinnell stated the Town Attorney has provided due diligence in his review of the Findings of Fact and direction to the Board, and adding Mr. Balano's Finding provides further weight in their decision. Ms. Tuveson noted she believes the Board has given this project more than reasonable consideration, but believes the threshold in this case is zoning, not mineral extraction. She believes the applicant's remedies have been exhausted with the Board and their next avenue is court.

Mr. Rayback, Attorney, asked the Board to consider touching on both of these issue in the Findings. If they receive a remand from Superior Court, they do not want to have to again argue that they need a mineral extraction permit.

Mr. Balano moved to add Finding of Fact #13 to state:

Under Subsection 3M of MSR 38§4358, the project proposed as an expansion is not preempted, and is not permitted in a mixed-use zone where single family dwellings are not permitted, under Subsection 2 of the same statute.

Ms. Tuveson seconded

Motion carried unanimously

Following discussion on how to proceed, Mr. Balano read the Findings as follows:

Whereas Applicant and Owner Stephen A Hynes, Trustee, Owner to expand the adjacent Yankee Commons Mobile Home Park to create 77 sites on 50 acres. Property is located off Idlewood Lane/U.S. Route 1, Map 66, Lot 24 in the Mixed Use Zone.

Considered to be a part of the approval by the Planning Board in this Finding consists of the following:  
Application and supporting documents:

1. Application Booklet (7/2012 Rev 9/4/12)
2. Plans and supporting information submitted for Special Permit (8/5/13 and 9/6/13)
3. Memos from Code Enforcement Officer regarding Special Permit (9/5/13 and 9/12/13)

Plans Submitted (Plan Set of 22 Sheets; 8/1/2012, Rev 10/17/12) (By reference)

Now therefore, based on the entire record before the Planning Board and pursuant to the applicable standards in the Land Use and Development Code, the Planning Board makes the following factual findings:

1. Sketch Plan approval granted February 23, 2012.
2. Preliminary Plan application accepted August 23, 2012.
3. Peer Review Engineer report submitted August 31, 2012.
4. Site Walk held September 4, 2012.
5. Public Hearing held September 13, 2012.
6. Substantive review began September 13, 2012.
7. On September 13, 2012, the Planning Board found the project's proposed earth removal excessive and determined "the proposed material excavation is not incidental to the construction activities of the project". The applicant was directed to seek a special permit per Title 16.9.1.2 Mineral/Earth Material Exploration and Removal, or submit a revised plan with a design that required less extensive excavation.

8. Proposed amount of material in place to be removed from the project site ranges from 178,000 to 200,000 cubic yards with an insignificant amount being used on site (cited from testimony by the applicant and Peer Review Engineer).
9. Proposed amount of material in place to be removed from the site by truck would yield at least 11,125 truckloads. (Trips based on the in place amount times a factor of 125%, accommodating expansion after blasting, and 20 cubic yards per truckload. Estimate from the Peer Review Engineer.)
10. Per Title 16.2, Definitions, Mineral Extraction means *any operation within any twelve (12) month period which removes more than one hundred (100) cubic yards of soil, topsoil, loam, sand, gravel, clay, rock, peat, or other like material from its natural location and to transport the product removed away from the extraction site.*
11. All mineral extraction requires a special permit per Title 16.9.1.2. The applicant has not obtained this special permit. The Code Enforcement Officer's September 11, 2013 recommendation to the Planning Board determines that mineral extraction is not allowed in the Mixed-Use Zone, where the majority of the proposed earth removal is located.
12. The applicant does not intend to submit any revised plans that would consider a lesser amount of earth removal for the Planning Board's review and approval. (Cited: Gary Beers at the September 13, 2012 Planning Board meeting, and June 26, 2013 email from Tom Harmon to Gerry Mylroie.)
13. Under Subsection 3M of MSR 38§4358, the project proposed as an expansion is not preempted, and is not permitted in a mixed-use zone where single family dwellings are not permitted, under Subsection 2 of the same statute.

Now therefore the Kittery Planning Board, based on the above Findings, denies further consideration and approval of the Preliminary Development Plan at the above referenced property.

Vote of 7 in favor 0 against 0 abstaining

Per Town Code Section 16.6.2 Appeal of Planning Board, Board of appeals or Port Authority Decision.

- A. *An aggrieved party with legal standing may appeal a final decision of the Planning Board to the York County Superior Court in accordance with Maine Rules of Civil Procedures Section 80B within forty-five days from the date the decision by the Planning Board was rendered.*

## **ITEM 2 – Town Code Amendment – Title 16, Chapter 11, Marine Development.**

Discuss proposed amendment and schedule a public hearing. Amendments include changes to procedures allowing for Port Authority application submittal prior to obtaining State and Federal permit approvals. Mr. Mylroie explained this is back before the Board because changes were made without a quorum and another public hearing must be scheduled.

Ms. Driscoll asked if there is anything that has come out of the recent discussions regarding the BIG project that may have a bearing on this proposed amendment. Mr. Melanson explained the current ordinance requires all permits (DEP/ACOE, etc.) be in hand prior to Planning Board or Port Authority review. This is not required of other Planning Board applicants and is prejudicial. The reason for doing this is to allow local review concurrently with permit review. The revision also includes that no building permit may be issued without all permits in place. The BIG project was reviewed locally while other permits were reviewed concurrently. Ms. Tuveson asked if he was fine with the proposed changes. He said the changes evolved and cover the need for concurrent review. Mr. Emerson stated this needs a public hearing prior to recommendation to Council. Mr. Balano noted that striking the word 'substantial' would impact a simple pier that would attach to the upland, requiring Planning Board and Port Authority Review. Mr. DiMatteo explained under 16.11.1.B the Port Authority may approve such an application. Ms. Tuveson stated this is then in opposition and not good law. Board discussion followed in an attempt to

rectify the contradictory sections. Mr. DiMatteo suggested: *16.11.3.A All applications containing upland development requires Planning Board review, excluding development as described in Title 16.11.1.B.* Board members agreed this would solve the problem.

Ms. Tuveson moved to forward this amendment, as amended, to a public hearing.

Mr. Balano seconded

Motion carried unanimously by all members present.

### **ITEM 3 –Town Code Amendment – Title 16.7.8 Land Not Suitable for Development.**

Discuss proposed amendment and schedule a public hearing. An amendment to the Town Code to address the applicability the *Soil Suitability Guide for Land Use Planning in the State of Maine* referenced in Title 16.7.8.1 Locations of Sewage, item 5, which pertains to soils related to septic sewage. The proposed amendment also includes changes to the net residential area calculations.

Mr. DiMatteo explained he provided examples of how other communities have dealt with this issue, by including specific methods for determining net residential area. In the proposed amendment language, he gathered the most often used methods as a replacement for the existing language in Article VIII Land Not Suitable for Development. Ms. Tuveson stated she felt the existing document needed to be replaced with something else. Ms. Grinnell stated the proposed amendment would do that.

Mr. DiMatteo explained that Tom Harmon, in a recent application, has proposed removing all the poorly and very poorly drained soils and only 50% of the somewhat poorly drained soils to determine net area.

Mr. Alesse asked how poorly or very poorly drained soils are determined, noting that Title 16.2 requires water table measurement over specific time periods which would require monitoring and delay development. A source identifying location and methodology to determination these soils is needed. Mr. Mylroie stated that source would be the York County Soil [and Water Conservation] District. Mr.

DiMatteo stated these terms are defined and used by soil scientists. Mr. Melanson suggested the Maine State Plumbing Code could drive this determination, and asked Mr. Clifford for his input. Jeff Clifford stated he is not a licensed septic designer, but engineers work within the State Plumbing Code, and soil scientists utilize the National Cooperative Soil Survey Classification to identify soil characteristics when conducting soil surveys. Mr. Alesse stated the proposed amendment does not address a methodology. Mr. Mylroie suggested amending the definition in 16.2 and then referencing the definition in the proposed amendment. Ms. Driscoll suggested the Board conduct a workshop and invite soil scientists to work with them to get this right. Earledean Wells asked if the standards a certified Maine Soils Scientist would use differ from the York County Soil service standards. Ms. Driscoll stated the Board needs to be aware of what they will be referencing. Mr. Alesse suggested including Bill Straub. Board members also requested the definition be re-visited and workshop discussion include information on community septic systems. Mr. Alesse asked who would be invited. Mr. Emerson stated experts have been invited to participate in prior workshops, and workshops are open to the public. Ms. Tuveson stated that once the Board comes to a consensus about what documents or method will become ordinance, she does not want to have to have the findings of the experts questioned, as she is not a soils scientist. Mr. Emerson concurred the Board must consider the advice of experts. Board members asked that deductions include exact areas of proposed roads, parking, etc. rather than a general percentage. Language found in the Cape Elizabeth ordinance was discussed, and a suggested inclusion could be:

This portion shall be deemed to be (i) fifteen percent (15%) of the gross area or (ii) at the option of the Planning Board, the actual area devoted to streets, parking lots....

Mr. Clifford reviewed the proposed ordinance and concurred with recommended language A-C.

*D. All land that is located on filled tidal lands* may need to include a date. Ms. Driscoll provided examples in Kittery. Discussion followed regarding how to select a date, such as when Kittery's ordinance was first adopted, or by contacting the ACOE.

*E. ....15% of the gross parcel area* in addition to subtracting easements and rights of way is double dipping, and on larger parcels of land could have a significant impact on the development. He thought the Cape Elizabeth solution would work better.

*F. ....any isolated portion of the parcel.* This is vague. What is considered isolated? If a wetland crossing is required, does that create an isolated portion?

*G. ... unsuitable soil that is subject to severe erosion or mass movement...* may need to be better defined.

*H.* This has been discussed and will be discussed further in workshop.

*I. ... somewhat poorly drained soils, 50% of the area is subtracted....* Mr. Clifford noted some communities include poorly drained soils as well, which is not unusual, though never with very poorly drained soils. Regarding Mr. Alesse's comments regarding monitoring water in the soil, this can be determined at any time of the year by the color of the soil, and noted some examples. There are instances where soils could have dual poorly and somewhat poorly drained classifications.

Mr. Mylroie stated if a 50% credit is provided, those areas north of Spruce Creek could experience an increase in density. If development is to be limited in that area, a 25% credit could be applied.

[unidentified] asked the Board to include discussion of Title 16.8.7.1 at the workshop as it includes the same reference. Staff will return with a workshop date for the Board.

#### **ITEM 4 – Board Member Items / Discussion**

A. Review punch list, update and establish priorities; B. Review By-Law changes;

C. Discuss workshop on municipal planning boards; and D . Other

Mr. Emerson referenced the prior meeting that lasted past 11:00 p.m. He recommended:

1. The number of agenda items be limited, with no guarantee that an item will be reviewed immediately after submittal if the agenda is full. Mr. Alesse asked if the Chairman approves the agenda. Mr. Emerson stated 'more or less'. He instructed staff to make it clear to applicants that they may not be placed on the agenda immediately just because they met the deadline for submittal.
2. Time limits on public testimony and applicant presentation. Ms. Grinnell asked when the Board may ask questions of the applicant. Mr. DiMatteo summarized the application review process for the Board, noting the Board may ask questions of the applicant at any time, but more substantive questions are usually addressed during preliminary review and the public hearing. Discussion followed regarding the number of agenda items and time limits on agenda items. Mr. Melanson suggested time limits be announced during review as a reminder to the applicant and public to move things along. Ms. Tuveson stated sometimes the answer is 'no' based on actual reasons, and a project need not be dragged out longer than necessary. The Board needs to be prepared and be firm. Mr. DiMatteo suggested that applicants not present at public hearings, but respond following the hearing, or at a later date. The Board could also workshop with the applicant to gain a better understanding of the issues prior to submittal of the preliminary plan and the start of the review clock. Mr. Alesse suggested a time clock be purchased.
3. A clear understanding about waivers is needed. Perhaps the staff should not proceed with applications where it is clear the Board will not grant a waiver...it becomes a non-starter. Waivers could possibly be submitted at sketch plan.

Ms. Tuveson asked if the Board is to give credence to the advice of experts, or argue with them if the Board does not like what they have to say. Mr. Balano noted the Board should accept all evidence and then decide based on evidence provided. Ms. Driscoll stated there is more than one way to look at things and experts are generally hired to look at things the way the applicant wants them to. Ms. Tuveson asked if Ms. Driscoll will then always look at an applicant's expert with the assumption that they are paid to show the project in the most favorable light and, if so, is it worth hearing from that expert? Ms. Driscoll stated she may question some things that an expert has to say, and considers individuals who have first-hand knowledge of a property. Mr. Balano noted that two experts may have differences of opinion and it is up to the Board to sift through the information, but both experts are placing their licenses on the line. Mr. Emerson concurred that no professional will put their license or reputation on the line by falsifying

evidence. Discussion followed regarding review of application contents (i.e. square footage and percentages). Mr. Emerson stated if there is an error, the Board should remand the application back to its proper place and not spend time deliberating the issue.

**ITEM 5 – Town Planner Items:** A. Residential Growth Management; B. Quality Improvement Overlay Zone; and C. Other

1. Mr. Mylroie acknowledged Mr. Balano's service to the Board as he leaves. He noted that Mr. Melanson, Mr. Emerson and Ms. Grinnell's terms expire in November and if they wish to continue will need to submit their intent for Council consideration.
2. At the October 24, 2013 meeting, a presentation will be made by MDOT on the Memorial Circle improvement project. Mr. Emerson asked that this be included in the Council's packet so they are aware of the workshop. At this meeting or a subsequent meeting, the Board should be prepared to communicate their recommendations before it goes to Council. Ms. Grinnell asked that documents be provided. Mr. Melanson stated the recent informational meeting on the Sarah Long Bridge was outstanding. Mr. Mylroie noted the Board needs to formally form a recommendation to Council regarding the Sarah Long Bridge landing design.
3. There is only one meeting scheduled in November and December. He asks the Board hold a joint workshop on November 7 with the Comp Plan Update Committee and the Port Authority to discuss the Shore and Harbor Plan, which is part of the comprehensive plan. There would be a regular Board meeting on November 14. Mr. Melanson stated the KPA would hold an abbreviated meeting from 6:00 to 6:30, with the workshop beginning at 6:30. This Plan would help set the stage for future grants and funding for the Town. Ms. Grinnell suggested the Council be invited as well. There will be only one December meeting, scheduled for December 12.

Mr. Melanson asked what items are pending for Board review. Mr. Mylroie stated the load is light. Following discussion, a workshop on net residential density was scheduled on November 14.

Mr. Emerson asked about reversing direction at the approach to Sarah Long Bridge. Ms. Tuveson noted the roundabout was the most expensive, with the intersection the most practical. Discussion followed regarding the impact on private property. The need to raise the bridge will be reduced due to the increase in the height of the bridge. Another shareholder meeting will be scheduled by MDOT and once this is determined, a workshop can be scheduled. Ms. Grinnell suggested the Board could schedule a workshop after the meeting.

Ms. Grinnell moved to adjourn

Ms. Tuveson seconded

Motion carried unanimously

The Kittery Planning Board meeting of September 26, 2013 adjourned at 8:26 p.m.  
Submitted by Jan Fisk, Recorder, September 29, 2013